

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANGELA R. SANFORD,

Case No. 5:13-CV-15167

Plaintiff,

Honorable Judith E. Levy
Magistrate David R. Grand

v.

DELOITTE, LLP a/k/a
DELOITTE & TOUCHE USA LLP,
a/k/a DELOITTE & TOUCHE LLP,

Defendant.

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**DEFENDANT'S MOTION FOR LEAVE TO FILE A SUR-REPLY TO
RESPOND TO NEW ALLEGATIONS IN PLAINTIFF'S REPLY
REGARDING ITS SECOND MOTION TO COMPEL**

Defendant, by its attorneys, Kienbaum Oppenwall Hardy & Pelton, P.L.C., moves for leave to file a short sur-reply brief (attached as Exhibit A to the accompanying brief) regarding Plaintiff's motion to compel the deposition of Brian Harrison. In support of its motion, Defendant states the following:

1. On February 4, 2015, Plaintiff Angela Sanford filed a reply brief in support of her motion to compel the deposition of Brian Harrison. That reply raised an entirely new theory for why she should be permitted to depose Harrison, stating that she submitted a resume to Deloitte "in 2012" and implying that she had thus expressed interest in the same position that Brian Harrison was hired into in January 2012.

2. Plaintiff's implication is indisputably false, as the resume in question was submitted in August 2012—well after Harrison's hiring, and for a different job position.

3. Sixth Circuit law provides that a sur-reply is appropriate when, as here, a party raises a new argument for the first time in a reply brief and the non-moving party will otherwise not have an opportunity to respond. Here, the Court has already indicated that it will resolve the current motion on the papers, and so Defendant will not have an opportunity to address this matter at a hearing. Nor did Sanford's reply brief provide the Court with the relevant testimony and exhibits

that would allow it to evaluate Sanford's newly-alleged and factually incorrect assertions.

4. Given these circumstances, Defendant seeks leave to file a short sur-reply brief, in order to provide the Court with the source documents and testimony that foreclose Sanford's new theory for deposing Brian Harrison.

5. Consistent with the instructions provided by this Court's case manager and law clerk in a telephone call on February 4, 2015, concurrence in the relief sought herein was discussed with Plaintiff's counsel. Plaintiff's counsel denied concurrence today, necessitating the filing of this motion.

WHEREFORE, for these reasons and those set forth in more detail in the brief accompanying this motion, Defendant seeks leave to file the attached sur-reply brief.

KIENBAUM OPPERWALL HARDY
& PELTON, P.L.C.

By: /s/Thomas J. Davis

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Dated: February 5, 2015

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**DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE
A SUR-REPLY TO RESPOND TO NEW ALLEGATIONS IN PLAINTIFF'S
REPLY REGARDING ITS SECOND MOTION TO COMPEL**

CONCISE STATEMENT OF ISSUES PRESENTED

1. Should Deloitte be permitted to file a sur-reply when Angela Sanford's reply brief asserts a new, demonstrably incorrect basis for deposing Brian Harrison, given that Deloitte will not otherwise have an opportunity to respond because the Court has already stated that it will resolve the motion on the papers?

Defendant Deloitte LLP says "yes."

Plaintiff Angela Sanford would say "no."

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ARGUMENT

In her February 4, 2015 reply in support of her request to deposing Brian Harrison, Sanford argues that she should be able to depose Brian Harrison because she submitted a resume to Deloitte's Arica Harris "in 2012" and was rejected for a "senior audit position," and that this was a sufficient expression of interest in a job despite her not submitting a formal application. (Reply Br. at 5-8.) This is a new argument, never raised in her opening brief.

Sanford's clear implication is that she submitted this resume *for the job Harrison received*, such that he is an appropriate comparator for deposition. That is demonstrably false. Sanford's new argument is incorrect on two fronts:

- *First*, Sanford gave her resume to Arica Harris in *August 2012*—well after Harrison was hired in January 2012.
- *Second*, Harrison's January 2012 job was an entry-level position, but Sanford's August 2012 correspondence expressed interest in a senior audit position; for this reason too, Harrison would not be a relevant comparator regarding this August 2012 submission.

It is well-established that it is improper for a party to raise new arguments in a reply brief, and that if the Court intends to rely on those new arguments, the Court should "allow the nonmoving party an opportunity to respond." *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 481-82 (6th Cir. 2003); *Mellian v. Hartford Life & Acc. Ins. Co.*, No. 14-10867, 2014 WL 7366104, at *1 n.1 (E.D. Mich. Dec. 24, 2014) ("sur-reply is appropriate . . . where the opposing party raises new

arguments or presents new evidence for the first time in a reply brief, such that the party seeking leave to file the sur-reply had no opportunity to address the arguments or evidence in its prior submissions.”)

Here, the Court has already indicated that it will address this motion on the papers, without a hearing. (Dkt. 41.) Thus, without a sur-reply, Deloitte will have no opportunity to offer a response to Sanford’s newly-alleged theory of why she should be allowed to depose Harrison. Deloitte seeks leave to file a short sur-reply (attached as Ex. A) so it may provide the Court with documents and testimony related to Sanford’s contact with Arica Harris, which rule out any basis for deposing Harrison.

CONCLUSION

The motion for leave to file a sur-reply should be granted.

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Dated: February 5, 2015

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2015, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to the following: ajennings@edwardsjennings.com; Duncan@iabattorneys.com and I hereby certify that I have caused to be served via U.S. mail the foregoing document to the following non-ECF participants:

(no manual recipients)

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